

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

## ORDER

Pending before the Court is Defendant Gerald Delemus's ("Defendant's") Emergency Motion for Compassionate Release, (ECF No. 3499). The Government filed a Response, (ECF No. 3501), and Defendant did not file a Reply.

For the reasons discussed below, the Court **DENIES** Defendant's Motion for Compassionate Release.

## I. BACKGROUND

On August 25, 2016, Defendant pleaded guilty to one count of Conspiracy to Commit an Offense Against the United States in violation of 18 U.S.C. § 371 and one count of Interstate Travel in Aid of Extortion in violation of 18 U.S.C. §§ 1952(a)(2) and 2. (Mins. Proceedings, ECF No. 646); (J., ECF No. 2068). On May 31, 2017, the Court sentenced Defendant to 87 months' custody, to be followed by 3 years' Supervised Release with special conditions. (J., ECF No. 2068). Defendant is presently in custody at Federal Medical Center ("FMC") Devens in Massachusetts. (*See* Mot. Compassionate Release ("Mot. Comp. Rel.") 1:21–22, ECF No. 3499); (Resp. 2:13–14, ECF No. 3501). Defendant now petitions this Court for compassionate release.

1        **II.    LEGAL STANDARD**

2        The compassionate release provision of 18 U.S.C. § 3582(c)(1)(A), as amended by the  
3 First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (Dec. 21, 2018), authorizes the sentencing  
4 court to modify a term of imprisonment in limited circumstances, upon a motion by the  
5 defendant. 18 U.S.C. § 3582(c)(1)(A). The sentencing court may order compassionate release,  
6 “if after considering the factors set forth in 18 U.S.C. § 3553(a),” the defendant has  
7 demonstrated: (1) he has exhausted his administrative remedies; and (2) “extraordinary and  
8 compelling reasons” warrant a reduction in his sentence. 18 U.S.C. § 3582(c)(1)(A). The  
9 Court must also consider whether a reduction in sentence is consistent with applicable policy  
10 statements issued by the United States Sentencing Commission. *Id.* While there is currently no  
11 applicable policy statement for § 3582(c)(1)(A) motions filed by a defendant, “the Sentencing  
12 Commission’s statements in U.S.S.G. § 1B1.13,” which apply to § 3582(c)(1)(A) motions filed  
13 by the Bureau of Prisons (“BOP”), “may inform a district court’s discretion for § 3582(c)(1)(A)  
14 motions filed by a defendant, but they are not binding.” *United States v. Aruda*, No. 20-10245,  
15 2021 WL 1307884, at \*4 (9th Cir. April 8, 2021). Under U.S.S.G. § 1B1.13, “extraordinary  
16 and compelling reasons” include, among other things, age, terminal illnesses, and medical  
17 conditions “that substantially diminish[ ] the ability of the defendant to provide self-care within  
18 the environment of a correctional facility and from which he or she is not expected to recover.”  
19 Further, prior to reducing a sentence, U.S.S.G. § 1B1.13 directs courts to determine whether the  
20 defendant is a danger to the safety of any other person in the community. *Id.* The court may  
21 also consider “other reasons” including a “reason other than, or in combination with” a reason  
22 specifically provided in the Sentencing Guidelines. *Id.* The decision to grant compassionate  
23 release is in the sentencing court’s discretion. *See United States v. Wade*, 2:99-cr-00257-CAS-3,  
24 2020 WL 1864906, at \*5 (C.D. Cal. Apr. 13, 2020).

1       **III. DISCUSSION**

2       **A. Exhaustion of Administrative Remedies**

3       Defendant admits that he has not exhausted his administrative remedies, but argues that  
4       the exhaustion requirement should be waived in this case because of the “exceptional  
5       circumstances of peculiar urgency” presented by the COVID-19 pandemic. (Mot. Comp. Rel.  
6       5:15–17) (citing *Hendricks v. Zenon*, 993 F.2d 664, 672 (9th Cir. 1993) (finding that the  
7       exhaustion requirement in habeas proceedings is not jurisdictional and can be dispensed of in  
8       rare cases)). To support this argument, Defendant explains that “[t]he futility and potentially  
9       irreparable harm [he] would suffer by being forced to file for compassionate release with FMC  
10      Devens, then wait at least 30 days for the acting warden to respond to his request, or to exhaust  
11      his administrative remedies, are manifest.” (*Id.* 9:9–12). In contrast, the Government argues  
12      that the exhaustion requirement is mandatory, and thus not subject to waiver. (Resp. 9:11–19).  
13      The Government requests that the Court deny the present Motion because Defendant failed to  
14      first petition the warden of FMC Devens for early release. (*Id.* 12:3–5).

15       Pursuant to 18 U.S.C. § 3582(c)(1)(A), exhaustion of administrative remedies is required  
16      before a district court may consider a request for compassionate release. To begin the  
17      exhaustion process, an inmate must submit a request for compassionate release to the warden of  
18      his facility. *See, e.g., United States v. Cornelio*, No. 17-cr-00321-DKW, 2020 WL 6021466, at  
19      \*2 (D. Haw. Oct. 12, 2020). Once this request has been submitted, there are two ways that the  
20      exhaustion requirement can be satisfied: (1) if thirty days have lapsed from the submission of  
21      the request for compassionate release without a response from the warden; or (2) if the warden  
22      denies the request within the thirty-day period, the inmate must “fully exhaust[] all  
23      administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the  
24      defendant’s behalf.” *See* 18 U.S.C. § 3582(c)(1)(A). Put differently, if the warden denies an  
25      inmate’s request for compassionate release within thirty days of submission, the inmate cannot

1 directly petition the district court for relief until he has appealed that denial through the  
2 Administrative Remedy Procedure outlined in 28 C.F.R. part 542, subpart B. *See, e.g., United*  
3 *States v. Blinks*, No. 1:17-cr-0248-AWI-SKO, 2020 WL 5366728, at \*2 (E.D. Cal. Sept. 8,  
4 2020); *United States v. Iwai*, No. 15-cr-00723-DKW, 2020 WL 6470167, at \*2–3 (D. Haw.  
5 Nov. 3, 2020). But see *United States v. Teran*, No. CR16-335RSL, 2021 WL 735722, at \*3 (D.  
6 Wash. Feb. 25, 2021) (finding exhaustion when the warden’s denial letter “did not set forth any  
7 rights to an administrative appeal or explain the procedures to file one.”).<sup>1</sup>

8 In the present case, seemingly unbeknownst to both the Government and defense  
9 counsel, Defendant submitted a request for compassionate release to the warden of FMC  
10 Devens on May 26, 2020, which was denied on June 10, 2020. (FMC Devens Compassionate  
11 Release Notification Form, Ex. D to Mot. Comp. Rel., ECF No. 3500).<sup>2</sup> The warden  
12 explained, in writing, that Defendant’s request for release was denied because Defendant can  
13 independently perform all activities of daily living, and Defendant’s medical conditions are  
14 treatable and can be managed by FMC Devens even in light of the COVID-19 crisis. (*Id.*). The  
15 warden’s letter also explained that Defendant had twenty days to appeal the denial using the  
16 Administrative Remedy process. (*Id.*). Because Defendant’s request for release was denied  
17 within thirty days, Defendant must “fully exhaust[] all administrative rights to appeal” prior to  
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19 <sup>1</sup> It should be noted that the two avenues for administrative exhaustion are mutually exclusive. When the warden  
20 denies an inmate’s request within the requisite thirty-day period, the inmate can no longer file a motion for  
21 compassionate release with the district court simply because thirty days elapsed since the request; the inmate  
22 then must exhaust his administrative remedies by appealing the denial through the BOP. *See, e.g., United States*  
23 *v. Sims*, No. CR18-0262JLR, 2020 WL 2838611, at \*4 (W.D. Wash. June 1, 2020) (citing *United States v.*  
*Miller*, No. 2:16-cr-00269-BLW, 2020 WL 113349, at \*2 (D. Idaho Jan. 8, 2020) (“The statute does not allow a  
defendant to short-circuit the BOP’s administrative procedures simply by waiting 30 days after filing the request  
if the warden timely acted on the request.”)).

24 <sup>2</sup> While the present Motion includes as an exhibit the warden’s denial of Defendant’s original request for  
25 compassionate release, the Motion neglects to refer to the denial and how it relates to the exhaustion requirement  
vis-à-vis administrative appeal. (*See* FMC Devens Compassionate Release Notification Form, Ex. D to Mot.  
Comp. Rel., ECF No. 3500). Instead, the Motion focuses its arguments on the inapplicable thirty-day lapse.

1 bringing a motion in this Court. *See* 18 U.S.C. § 3582(c)(1)(A). However, Defendant neither  
2 claims nor provides evidence that he appealed the warden’s denial of his request using the  
3 Administrative Remedy Procedure. Accordingly, Defendant failed to exhaust his  
4 administrative remedies, and thus, the Court lacks jurisdiction to consider the present Motion.  
5 *See, e.g., United States v. Brigham*, No. 1:17-cr-00308-NONE, 2020 WL 5995188, at \*5 (E.D.  
6 Cal. Oct. 9, 2020) (“because defendant received a denial within 30 days of the submission of  
7 his administrative request, he was required to appeal from that decision in order to exhaust his  
8 administrative remedies.”).

9       Nonetheless, Defendant argues that “a court can dispense with the administrative  
10 exhaustion requirement where, as here, there are ‘exceptional circumstances of peculiar  
11 urgency.’” (Mot. Comp. Rel. 4:9–5:17) (citing *Hendricks*, 993 F.3d at 672). To support this  
12 contention in the COVID-19 context, Defendant points to *United States v. Zukerman*, where the  
13 District Court for the Southern District of New York waived the exhaustion requirement for a  
14 75-year-old inmate with obesity, diabetes, and hypertension because of his advanced age and  
15 compromised health. 451 F. Supp. 3d 329, 334 (S.D.N.Y. 2020); (Mot. Comp. Rel. 6:4–7:2).  
16 However, the inmate in *Zukerman* suffered from multiple COVID-19 risk factors, in addition to  
17 his advanced age.<sup>3</sup> *Id.* The only COVID-19 risk factor applicable to Defendant is hypertension,  
18 which merely has a “possible” effect on the severity of illness from COVID-19. *See* CDC,  
19 “Coronavirus Disease 2019 (COVID-19): People with Certain Medical Conditions,”  
20 <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>, (last visited May 21, 2021). Without evidence of medical conditions that

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24       <sup>3</sup> The CDC states that diabetes “can make you more likely to get severely ill from COVID-19” and that “the risk  
25 of severe COVID-19 illness increases sharply with elevated Body Mass Index (“BMI”).” In combination with  
hypertension, these serious conditions establish that a person has a serious risk of complications and severe  
illness from COVID-19. *See* CDC, “Coronavirus Disease 2019 (COVID-19): People with Certain Medical  
Conditions,” <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>, (last visited May 21, 2021).

1 create a more concrete risk of severe illness, the Court does not find it appropriate in this case  
2 to waive 18 U.S.C. § 3582(c)(1)(A)'s exhaustion requirement.

3 Further, Defendant points to *United States v. Atkinson*, a case from this District, where  
4 the court granted compassionate release, despite the fact that the thirty-day statutory waiting  
5 period had not yet expired, because the inmate had “filed an application with the warden,  
6 followed up with the warden for a determination or status report, and received a generic  
7 response that did not indicate any action was being [taken] regarding his application.” *Atkinson*,  
8 No. 2:19-CR-55-JCM, 2020 WL 1904585, at \*4 (D. Nev. Apr. 17, 2020); (Mot. Comp. Rel.  
9 8:1–22). However, *Atkinson* is not analogous to the present case because, within thirty days of  
10 submitting his request, Defendant received a particularized response from the warden  
11 explaining the reasons for denial and options for appealability. (See FMC Devens  
12 Compassionate Release Notification Form, Ex. D to Mot. Comp. Rel.). As such, it would be  
13 fruitless for the Court to grant a waiver of the thirty-day waiting period, like in *Atkinson*,  
14 because Defendant can only demonstrate exhaustion by administratively appealing the  
15 warden’s denial to the BOP. See, e.g., *Brigham*, 2020 WL 5995188, at \*5.

16 Finally, district courts in the Ninth Circuit have overwhelmingly held that “failure to  
17 exhaust administrative remedies is fatal to a compassionate release petition even in light of the  
18 urgency created by COVID-19.” See, e.g., *United States v. Cambridge*, No. 2:17-cr-00227-  
19 KJD-NJK, 2021 WL 230044, at \*2 (D. Nev. Jan. 22, 2021) (quoting *United States v. Fuller*,  
20 No. 13-cr-00313-PJH-1, 2020 WL1847751, at \*2 (W.D. Wash. Apr. 13, 2020)). Accordingly,  
21 because Defendant failed to exhaust his administrative remedies, this Court lacks the authority  
22 to grant compassionate release under 18 U.S.C. § 3582(c)(1)(A).

23 **B. Extraordinary and Compelling Reasons**

24 Even if Defendant had properly exhausted his administrative remedies, this Court would  
25 still decline to grant compassionate release because Defendant has not demonstrated

1 “extraordinary and compelling reasons” for his release. Defendant claims that the COVID-19  
2 pandemic presents extraordinary and compelling reasons for his release because he is 65 years-  
3 old, pre-diabetic, and suffers from hypertension and hyperlipidemia. (Mot. Comp. Rel. 12:1-8).

4       Extraordinary and compelling reasons for compassionate release may exist when a  
5 defendant demonstrates he is suffering from a severe medical condition or has attained an  
6 advanced age. *See U.S.S.G. § 1B1.13.* When considering “extraordinary and compelling  
7 reasons” for release based on a medical condition in light of the COVID-19 pandemic, courts  
8 have looked to the safety of the defendant’s current detention institution compared to release, as  
9 well as whether the defendant’s medical conditions elevate the risk of severe illness from  
10 COVID-19. *See, e.g., United States v. Kauwe*, No. 3:14-cr-00044-MMD-WGC-1, 2020 WL  
11 2926460, at \*2 (D. Nev. June 3, 2020); *United States v. Walters*, No. 216CR00011JADPAL,  
12 2020 WL 3104049, at \*2 (D. Nev. June 11, 2020); *United States v. Delgado*, No. 3:18-CR-17-  
13 (VAB)-1, 2020 WL 2464685, at \*6 (D. Conn. Apr. 30, 2020). To determine whether a  
14 defendant’s age amounts to “extraordinary and compelling reasons” for release, courts consider  
15 whether defendant: (1) is at least 65; (2) is experiencing serious deterioration in physical or  
16 mental health because of the aging process; and (3) has served at least 10 years or 75 percent of  
17 his sentence. *See, e.g., United States v. Heffington*, 476 F. Supp. 3d 1042, 1049 (E.D. Cal.  
18 2020) (citing U.S.S.G. § 1B1.13, cmt. n.1(b)).

19       Here, the Court finds that Defendant’s medical conditions do not create a heightened  
20 risk of severe complications from COVID-19. Current CDC guidelines state that hypertension  
21 only “possibly” increases the likelihood of becoming severely ill from COVID-19. *See CDC,*  
22 “Coronavirus Disease 2019 (COVID-19): People with Certain Medical Conditions,”  
23 <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>, (last visited May 21, 2021). Moreover, the CDC guidelines do not designate  
24 hyperlipidemia or pre-diabetes as COVID-19 risk factors. *Id.* As such, evidence of  
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1 hypertension alone does not provide the “extraordinary and compelling reasons” necessary to  
2 support a decision for compassionate release. *See, e.g., United States v. Archer*, 2020 WL  
3 4059694, at \*2 (D. Nev. July 20, 2020) (“hypertension, on its own, would be concerning but  
4 not cause for compassionate release”).

5 Further, Defendant has not established “extraordinary and compelling reasons” for  
6 release based on his age. While Defendant is at least 65 years old, he has neither served 75  
7 percent of his sentence nor presented any evidence of serious deterioration in physical or  
8 mental health. To the contrary, FMC Devens reports that Defendant is capable of  
9 independently performing daily activities, and Defendant’s medical records state that his  
10 hypertension is “well-controlled.” (*See* FMC Devens Compassionate Release Notification  
11 Form, Ex. D to Mot. Comp. Rel., ECF No. 3500); (Medical Records at 46 of 66, Ex. B to Mot.  
12 Comp. Rel., ECF No. 3500). In light of the COVID-19 pandemic, the CDC does specify that  
13 “older adults are more likely to get severely ill from COVID-19,” but does not designate a  
14 specific age at which a heightened risk of complications may exist. *See* CDC, “Coronavirus  
15 Disease 2019 (COVID-19): People with Certain Medical Conditions,”  
16 <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>, (last visited May 21, 2021). Because Defendant’s underlying conditions are  
17 not major risk factors for COVID-19 complications and appear to be under control, Defendant  
18 has not demonstrated “extraordinary and compelling reasons” for release with regards to either  
19 his age or medical conditions. Accordingly, Defendant’s Motion for Compassionate Release is  
20 denied.

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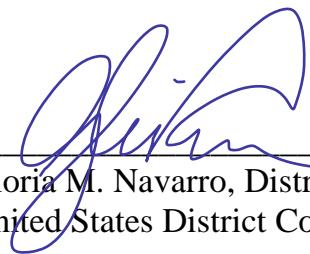
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1      **IV. CONCLUSION**

2      **IT IS HEREBY ORDERED** that Defendant's Motion for Compassionate Release,  
3 (ECF No. 3499), is **DENIED**.

4      **IT IS FURTHER ORDERED** that Defendant's Motion to Seal, (ECF No. 3500), is  
5 **GRANTED**.

6      **DATED** this 21 day of May, 2021.

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11      Gloria M. Navarro, District Judge  
12      United States District Court  
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